92-1463

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NUGGET HYDROELECTRIC, L.P.,
Petitioner

v.

PACIFIC GAS and ELECTRIC COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit (Nos. 91-15785, 91-16306), entered on December 7, 1992, affirming in part, vacating in part and remanding the case to the United States District Court for the Northern District of California.

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a private power developer states a claim under Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2, against a regulated public electric utility where the utility allegedly enhances its monopoly by engaging in predatory conduct to prevent the developer from complying with a power purchase agreement under the Public Utility Regulatory Policies Act, 16 U.S.C. §790 *et. seq.?*

2. Whether a claim pursuant to Section 1962(a) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(a), is stated where the claimant alleges facts showing an injury from the racketeering acts that generated income that was subsequently used in violation of the section?

3. Whether sanctions under Fed.R.Civ.P. 11 can be imposed upon a party who files in good faith a motion to compel production of documents based upon newly discovered, extrinsic evidence, where the movant did not seek reconsideration of a prior order restricting discovery because of the time limitation on reconsideration imposed by local court rule?

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No.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 981 F.2d 429 (9th Cir. 1992). The orders and opinions of the United States District Court for the Northern District of California are unreported and are attached hereto as appendices *infra*. (App. p. A-1 to A-20).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 from the judgment of the United States Court of Appeals for the Ninth Circuit, entered December 7, 1992, affirming dismissal by the district court of Petitioner's federal statutory claims.

STATUTORY PROVISIONS AND RULES INVOLVED

The following provisions of the Sherman Antitrust Act, 15 U.S.C. §2, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(a), Federal Rule of Civil Procedure 11 and Local Rule 410-2 of the Local Rules of the United States District Court for the Northern District of California are involved in this case:

1. Sherman Antitrust Act

   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by the fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §2, Pub.L. 93-528, §3, 88 Stat. 1708.

2. Racketeer Influenced and Corrupt Organizations Act

   (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of

> which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. §1962(a), Pub.L. 91-452, Title IX, §90(a), October 15, 1970, 84 Stat. 942 and amended Pub. L. 100-690, Title VI, §7033, November, 18, 1988, 1025 Stat. 4398.

3. Federal Rule of Civil Procedure 11 (in pertinent part)

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. The signature of an attorney or party constitutes a certificate by the signed that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a

> pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed.R.Civ.P. 11, as amended March 2, 1987.

4. Local Rule 410-2 (in pertinent part)

> (a) Nondispositive Pretrial Matters. Within ten days after the service on a party of a copy of any order of magistrate pursuant to 28 U.S.C. §636(b)(1)(A). Any party may serve and file a notice of motion for reconsideration by the assigned judge on the ground that the order is clearly erroneous or contrary to law, setting forth the portions of the order of which reconsideration is sought and the reasons therefor . . .

Local Rule 410-2(a), Local Rules of the United States District Court for the Northern District of California (as revised, November 1, 1988).

STATEMENT OF THE CASE

Petitioner is a limited partnership[1] created to develop and operate small, private hydroelectric generating

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1. Petitioner, Nugget Hydroelectric, L.P., is a California limited partnership whose general partner is Enervest Management Corporation, a Colorado corporation, and whose limited partners are Enervest Corporation, a Colorado corporation, Burnham Leasing Corporation, a New York corporation, and Sierra Hydro, Inc., a Delaware corporation. Petitioner is the debtor in a Chapter 7 bankruptcy action pending before the United States Bankruptcy Court for the Eastern District of California.

facilities pursuant to the provisions of the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. §790 *et. seq.*, Pub. L. 95-617. Respondent, Pacific Gas and Electric Company ("PG&E"), is a California public utility that generates, buys, sells and distributes electricity under the regulation of the California Public Utility Commission.

In 1984, PG&E entered into three power purchase agreements with Petitioner's predecessor-in-interest, Enviro Hydro, Inc. ("Hydro"), a private power project developer. PG&E agreed to purchase generated electricity, at a certain price over a 30 year period, from three hydroelectric projects, which were to be constructed in eastern California by Hydro on federal land administered by the United States Forest Service. The power purchase agreements provided that they would terminate if the projects failed to commence delivery of electricity to PG&E's transmission system by November 5, 1989, five years from the date of the agreements. The agreements also provided that the delivery deadline could be extended for a *force majeure* occurrence.

In September, 1988, Petitioner acquired Hydro's interest in the projects and power purchase agreements. Petitioner subsequently sought from PG&E a *force majeure* extension of the power delivery deadline based upon unforeseeable permitting delays allegedly attributable to the Forest Service. PG&E initially denied Petitioner's *force majeure* claim, but later offered a deferral of the power delivery deadline if Petitioner would agree to certain price concessions and waive all potential *force majeure* claims. Petitioner rejected PG&E's offer, which would have rendered the projects economically unviable, and tried to complete the projects to meet the deadline.

Petitioner and PG&E discussed various means for Petitioner's projects to interconnect with PG&E's transmission lines to deliver electricity to PG&E. In August, 1988, PG&E represented to Petitioner that one mode of

interconnection was preferable and would cost Petitioner an estimated $260,000 to $270,000. In October, PG&E notified Petitioner that it had approved in principle that interconnection plan and was prepared to produce a "detailed interconnection study", PG&E's final estimate of interconnection cost to be paid by Petitioner. Petitioner authorized PG&E to proceed.

In February, 1989, PG&E sent Petitioner its final analysis of the recommended interconnection plan, which deviated substantially from PG&E's earlier representations.[2] The analysis estimated that implementation of the plan would cost Petitioner $825,520 and could not be completed by PG&E until six weeks after the contract deadline. In addition, PG&E advised Petitioner that it might be required to reimburse PG&E for unknown "take or pay" energy costs incurred pursuant to a contract between PG&E and the Placer County Water Authority, another power producer. PG&E refused, however, to disclose to Petitioner that contract's provisions. PG&E also advised Petitioner that implementation of the plan was contingent upon the consent of a third party landowner, who, according to PG&E, refused to agree. However, two days later Nugget approached the landowner and secured the requisite consent with ease.

These events proved disquieting to Petitioner's lender, Credit Suisse, and in April, 1989, it declared a default under loan agreements and withdrew further support of Petitioner's projects. Seven months later, Petitioner filed for bankruptcy protection as a debtor-in-possession.

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2. Petitioner's complaint alleged a series of acts committed by PG&E with intent to defeat Petitioner's performance of the power purchase agreement, including, *inter alia*, the misrepresentations related to the proposed interconnection plan.

A. District Court Action

On April 27, 1990, Petitioner filed its Complaint in the United States District Court for the Northern District of California. On July 20, 1990, PG&E moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) arguing, *inter alia*, that Nugget had failed to allege legally cognizable antitrust or RICO claims, that PG&E was exempt from antitrust scrutiny, and that diversity jurisdiction was not properly alleged as to Petitioner's state law claims. Petitioner timely filed opposition to this motion.

On October 5, 1990, the district court entered its order granting the motion to dismiss as to the antitrust claim, denying the motion as to the RICO and state law claims, and requiring Petitioner to file a RICO Statement[3]. On October 25, 1990, Petitioner timely filed its RICO Statement and moved for certification of the dismissal of the antitrust claim for immediate appeal pursuant to 28 U.S.C. §1292. The district court denied the certification motion on December 3, 1990.

During the pendency of the aforestated motions, Petitioner and PG&E commenced discovery by reciprocally seeking production of documents. Petitioner's first request for production of documents resulted in a motion to compel, filed December 6, 1990. Magistrate Judge Langford, upon referral of the discovery matter by the district judge, entered an order on January 10, 1991 denying, in part, the motion to compel and restricting the scope of document discovery ("January Order").

During the pendency of its first motion to compel, Petitioner submitted a second request for production of documents to PG&E on December 14, 1990. PG&E

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3. The district court found PG&E exempt from antitrust scrutiny pursuant to *Parker v. Brown*, 317 U.S. 341 (1943). The RICO Statement compelled by the district court's order required Petitioner to respond to twenty (20) interrogatories detailing its allegations against PG&E.

objected in its response to further production citing the January Order.

On March 5, 1991, Petitioner filed a second motion to compel, alleging that newly discovered, extrinsic evidence, of illicit PG&E corporate policy regarding qualifying facilities[4], justified production of the requested documents. PG&E opposed the motion and filed a cross-motion for Rule 11 sanctions. After briefing, and without oral argument, the magistrate entered an order on May 24, 1991, denying the motion to compel and imposing, as a Rule 11 sanction, reimbursement of PG&E's alleged attorney's fees. On September 3, 1991, the magistrate entered an order assessing the amount of $10,042.00.

On March 21, 1991, PG&E filed a motion for judgment on the pleadings as to the RICO claims. Petitioner responded to this motion by filing an opposition and counter-motion seeking leave to amend its complaint. On April 22, 1991, prior to the close of discovery, the district court ruled upon PG&E's motion. The district court denied Petitioner leave to amend, granted judgment on the pleadings as to the RICO claims and, *sua sponte,* dismissed Petitioner's state law claims for lack of diversity jurisdiction.

On May 17, 1991, Petitioner filed a Notice of Appeal from the April 22, 1991 and October 5, 1990 orders.

A timely motion for reconsideration of the magistrate's May 24, 1991 discovery order was filed on June 6, 1991. On July 11, 1991, the district court denied reconsideration.

On August 2, 1991, Petitioner filed a notice of appeal from the court's July 11, 1991 order.

B. Court of Appeals

Petitioner and PG&E submitted briefs to the Court of Appeals and argued the case before a three judge

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4. Under PURPA, a developer of a private power generating facility is referred to as a qualifying facility, or QF.

panel on July 17, 1992. On December 7, 1992, the court issued its judgment affirming in part, vacating in part and remanding the case.

The Court of Appeals held that PG&E was immune from antitrust scrutiny, with the exception of its conduct surrounding Petitioner's interconnection plan. 981 F.2d at 433-435. The court affirmed the district court's dismissal, however, on the basis that Petitioner had failed to state a monopolization or attempted monopolization claim because it planned to be a supplier of power to PG&E rather than a direct competitor in the sale of electricity. 981 F.2d at 436.

The Court of Appeals also affirmed the district court's dismissal of Petitioner's RICO claims. The court held that Petitioner's §1962(a) claim failed to allege that Petitioner was injured by PG&E's investment of its alleged racketeering income. *Id.* In so holding, the Ninth Circuit joined the Second, Third and Tenth Circuits and rejected the contrary reasoning of the Fourth Circuit[5]. *Id.*

The court vacated the district court's dismissal of Petitioner's state law claims, finding that Petitioner's proposed amended complaint properly alleged diversity jurisdiction. 981 F.2d at 438. Finally, the Court affirmed the magistrate's order denying Petitioner's second motion to compel and imposing Rule 11 sanctions. 981 F.2d at 438-439.

Petitioner files the within petition seeking review of the Ninth Circuit's affirmance of the district court.

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5. *See Ouaknine v. MacFarlane,* 897 F.2d 75 (2nd Cir. 1990); *Rose v. Bartle,* 871 F.2d 331 (3rd Cir. 1989); *Grider v. Texas Oil & Gas Corp.,* 868 F.2d 1147 (10th Cir.), *cert. denied,* 493 U.S. 820 (1989); *but see Busby v. Crown Supply, Inc.,* 896 F.2d 833 (4th Cir. 1990).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit erred in concluding that a regulated public utility cannot be liable under Section 2 of the Sherman Antitrust Act for enhancing its monopoly by preventing a private power developer from supplying power to the utility, pursuant to a power purchase agreement, because they are not competitors.

Petitioner submits that this case presents an important issue of first impression concerning the relationship between public utilities and small, private power developers who supply electricity to those utilities under agreements mandated by PURPA. Petitioner contends that the Ninth Circuit's holding is erroneous because the court failed to consider the unique manner in which PG&E acts to increase its economic power and the anticompetitive effect of PG&E's predatory conduct in preventing private power project developers from exploiting opportunities afforded by PURPA.

This Court recently restated that:

> The purpose of the [Sherman Antitrust Act] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.
>
> *Spectrum Sports, Inc. v. McQuillan,* 113 S.Ct. 884, 891-892 (1993) (citations omitted).

The Ninth Circuit held that Petitioner failed to state a monopolization claim because Petitioner planned to be a supplier to PG&E under the power purchase agreements. 981 F.2d at 436. The court rejected Petitioner's allegation that it was a competitor of PG&E because it

could have generated and sold power in competition with PG&E and, therefore, by bringing about Petitioner's demise, PG&E enhanced its monopoly power. *Id.*

Had Petitioner been allowed to construct its generation facilities and to interconnect them with PG&E's transmission lines, Petitioner could have sold its power to others, and PG&E would have been obligated to wheel that power. However, as alleged by Petitioner in its complaint, PG&E, by erecting contrived impediments to Petitioner's performance of the power purchase agreements, eliminated Petitioner as a potential competitor. *See, T.V. Signal Co. of Aberdeen v. American Telephone & Telegraph,* 617 F.2d 1302, 1308 (8th Cir. 1980) (Defendant was subject to antitrust scrutiny where plaintiff had taken sufficient steps to establish itself as a potential competitor because it could eventually expand into other services); *See also, Order Instituting Rulemaking 2,* 8 C.P.U.C.2d 20, 88 (1982) ("The attractive feature of wheeling is that it introduces actual competition into the market").

Moreover, the Court of Appeals refused to consider a valid, significant alternative basis for Petitioner's status as a competitor of PG&E[6]. Petitioner submits that PG&E's conduct, in eliminating Petitioner as a qualifying facility, artificially enhanced PG&E's demand for

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6. The Court of Appeals stated that Petitioner waived this argument by failing to include it in its opening brief. 981 F.2d at 436. This holding completely overlooks the fact that the argument was raised in reply to PG&E's argument in its opposing brief that PG&E's income is not increased by elimination of the Petitioner. Further, the Court of Appeals abused its discretion in refusing to address this significant argument. *See, e.g., In re Riverside-Linden Investment Co.,* 945 F.2d 320, 324 (9th Cir. 1991). Indeed the Ninth Circuit's rule that an argument not raised in an opening brief is waived is an unwarranted limitation on F.R.A.P. 28 and is in conflict with the holdings of other circuits. *See, e.g., Picker International, Inc. v. Parten,* 935 F.2d 257, 265-266 (11th Cir. 1991); *Jackson v. University of Pittsburg,* 826 F.2d 230, 237 (3rd Cir. 1987). *But see, Beraha v. Baxter Health Care Corp.,* 956 F. 2d 1436, 1441 fn. 5 (7th Cir. 1992).

internal electrical generating capacity, thereby increasing its rate of return to shareholders by accelerating the increase in its rate base. Accordingly, Petitioner and PG&E are unquestionably competitors in terms of the generation of electricity for PG&E's existing customers.

This Court has historically recognized the importance of applying the antitrust laws to protect competitive small business from elimination by the largest businesses through their use of unfair or predatory means. *See, e.g., Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Brunswick Corporation v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). Once again, this Court is called upon to protect the public from the predatory conduct of a large monopoly. Petitioner respectfully asks this Court to heed that call and grant this petition for a writ of certiorari.

II.

This Court should grant certiorari to resolve a conflict among the circuits as to whether a claimant under 18 U.S.C. §1962(a) need allege injury by investment of racketeering income or need only allege an injury from racketeering acts that generated income that was used in violation of the section.

In the case *sub judice*, the Ninth Circuit held for the first time that a complaint under 18 U.S.C. §1962(a) ("1962(a)") must allege that the claimant was injured by the defendant's investment of its alleged racketeering income. 981 F.2d at 437. In doing so, the court joined three other circuits, the Second, Third and Tenth, who have embraced this view and rejected the thoughtful, well- reasoned contrary holding of the Fourth Circuit. *See Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) ("Busby"); *but see Ouaknine v. MacFarlane*, 897 F.2d 75 (2nd Cir. 1990); *Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989); *Grider v. Texas Oil and Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). This conflict between the holdings of five circuits,

concerning a statute whose application is of increasing significance in federal civil proceedings, militates in favor of granting certiorari.

Petitioner submits that the analysis of the *Busby* court should be adopted by this Court. To do otherwise, as did the Court of Appeals in this case, would emasculate §1962(a) and deprive plaintiffs of relief under the statute from injuries caused by corporate acts of racketeering. The opinion in *Busby* is supported not only by sound statutory construction, but by important public policy considerations as well.

The *Busby* court held that the unambiguous language of RICO compels the conclusion that there is no limitation on recovery under §1962(a) for racketeering injury sustained "*after* the investment and/or use of the income." *Busby*, 896 F.2d at 837. The plain language of §1962(a) provides only that the income derived from the racketeering activity be used subsequently in the operation of the enterprise.

More importantly, the *Busby* court noted that, because under §1962(a) a corporation can be both the defendant-person and the enterprise, to require injury from the investment or use of the racketeering income would virtually eviscerate corporate liability under RICO. Id. Because plaintiffs injured by corporate acts of racketeering generally have only §1962(a) for relief, "[i]nvoking the 'investment use' rule would close this avenue off, as it is virtually impossible to prove that the invested income caused the injury." *Busby*, 896 F.2d at 839 (citations omitted).

It is essential for this Court to resolve this issue, if the congressional intent manifest in the broad language of the statute is to be effectuated. The Ninth Circuit, by joining three other Courts of Appeals in narrowly construing §1962(a), has effectively deprived all plaintiffs of a right of action against corporations who engage in racketeering activity. This error, and inconsistency between the circuits, must be resolved.

III.

This Court should grant certiorari and vacate the award of Rule 11 sanctions where counsel reasonably relied upon the limitations imposed by local rules of procedure and newly discovered evidence to bring a second motion to compel production of documents.

Petitioner submits that this Court should grant certiorari to resolve the issue of whether an attorney, who relies upon the limitations of a local rule and newly discovered extrinsic evidence, acts reasonably in filing a second motion to compel production of documents previously sought and denied by magistrate's order. Petitioner contends that the Ninth Circuit erred in affirming the district court's imposition of sanctions against Petitioner, where the second motion to compel involved a more detailed and specific request for document production and where pursuasive, new evidence justifying the request was presented to the magistrate.

This Court has established that Rule 11 imposes an objective standard of reasonable inquiry on any party signing a pleading, motion or other paper. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991). The standard of review applicable to the imposition of Rule 11 sanctions is abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990).

In the case *sub judice*, Petitioner sought to compel production of documents concerning, *inter alia*, PG&E's policies, practices, guidelines, seminars, and Board of Director meeting minutes related to PURPA, QF projects or Petitioner. In support of its second motion to compel, Petitioner submitted statements attributed to PG&E's chief executive officer in which he characterized PG&E as a "QF basher" and voiced strong opposition to PURPA. These statements included interviews published in the Wall Street Journal and Forbes magazine. Moreover, the published statements, with the exception of a single February, 1987 Industry Week

article, were unknown to Petitioner at the time it filed its first motion to compel.

Despite the new evidence supporting its second motion to compel, the district court found the motion to be frivolous. It has been held previously, however, that a party may rely on published articles to satisfy Rule 11. *See, e.g., Kamerman v. Steinberg,* 113 F.R.D. 511, 516-517 (S.D.N.Y. 1986) (Reliance upon news article appearing in the Wall Street Journal for fraud allegations in complaint is reasonable inquiry for purposes of Rule 11); *In re Ramada Inns Securities Litigation*, 550 F.Supp. 1127 (D.Del. 1982) (same).

The Ninth Circuit also affirmed the district court's imposition of Rule 11 sanctions because the magistrate found that Petitioner's "second motion to compel largely duplicated its first motion to compel, which had earlier been denied and from which denial no motion for reconsideration was filed." 981 F.2d at 439. However, the court wholly neglected to examine the application of Local Rule 410-2, which imposes a ten day limitation on filing a motion for reconsideration. *Local Rule of the United States District Court for the Northern District of California,* Rule 410-2(a).

Petitioner established that the new, extrinsic evidence of PG&E's anti-competitive corporate policy justifying further document production was not discovered until after the ten day period. Thus, Petitioner was left with a dilemma: to file an untimely (and potentially sanctionable) motion for reconsideration, or to file a second motion to compel. Petitioner chose the latter. Petitioner's course of action was a proper resolution of the procedural dilemma, according to at least one other court that had addressed the issue. *See In re Shell Oil Refinery,* 134 F.R.D. 148, 150-151 (E.D.La. 1990) (Filing of a discovery motion after denial of a prior motion, where the subject matter of the second motion differed, at least in part, by seeking information *beyond* that addressed in the first motion, held not to violate Rule 11).

Thus, Petitioner acted in an objectively reasonable manner in seeking to compel production based upon new evidence. *See, e.g., Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 83 (1987). The Ninth Circuit's refusal to consider that fact and its undue deference to the district court's erroneous finding should be reviewed.

This issue is of great importance. It is incumbent upon this Court to provide attorneys with uniform guidance as to what is objectively reasonable reliance for Rule 11 purposes. For those attorneys frequently engaged in representation of parties in diverse districts and circuits, permitting the continued application of diverse standards of objective reliance will spawn more collateral litigation under Rule 11 and will chill aggressive advocacy. Accordingly, this Court should grant certiorari.

CONCLUSION

In light of the important novel issue under the Sherman Antitrust Act presented by Petitioner, the conflict among five circuits in interpreting 18 U.S.C. §1962(a) and the important issue raised as to the proper meaning of objective reliance under Rule 11, Petitioner believes review of the decision below by this Court is warranted. Petitioner respectfully requests that its Petition For A Writ of Certiorari be granted.

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Nugget Hydroelectric, L.P.

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUGGET HYDROELECTRIC, L.P., *Plaintiff-Appellant,* v. PACIFIC GAS AND ELECTRIC COMPANY, *Defendant-Appellee.*	Nos. 91-15785 91-16306 D.C. No. CV-90-01248-JPV OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
July 17, 1992—San Francisco, California

Filed December 7, 1992

Before: J. Clifford Wallace, Chief Judge, Alfred T. Goodwin and Cecil F. Poole, Circuit Judges.

Opinion by Chief Judge Wallace

SUMMARY

Antitrust/Sherman Act/Monopolies/Litigation and Procedure (Civil)/Civil Litigation and Procedure/Antitrust

Affirming in part, vacating in part and remanding a district court judgment, the court of appeals held that the Sherman Antitrust Act has no effect on the applicability of the state action doctrine to gas and electric utilities like PG&E.

Appellant Nugget Hydroelectric, L.P., challenged a district court judgment in favor of Pacific Gas and Electric Company (PG&E) for the dismissal of its claim under Section 2 of the Sherman Antitrust Act on the basis that PG&E was immune from antitrust liability under the state action doctrine, and that court's denial of leave to amend its claims under the Racketeer Influenced and Corrupt Organizations Act (RICO). Nugget also challenged the district court's order denying Nugget leave to amend its state law claims and dismissing them. Nugget also claimed that the district court improperly refused to reconsider the magistrate judge's denial of a discovery request and imposition of sanctions under Fed. R. Civ. P. 11.

[1] Concerning Nugget's first argument that the state action doctrine has been preempted as to utilities by the Public Utility Regulatory Policies Act of 1978, the court concluded that the phrase "antitrust laws" embraces not only the text of the Sherman Antitrust Act and other listed statutes, but also the courts' interpretations of them. The state action doctrine is an interpretation of the Sherman Antitrust Act. Thus, the Act has no effect on the applicability of the state action doctrine to gas and electric utilities like PG&E. **[2]** Because the Act's applicable section is clear and fails to compel an absurd result, the court did not examine its legislative history. **[3]** Nugget argued in the alternative that even if the state action doctrine were available to gas and electric utilities, the doctrine does not protect PG&E's conduct because it fails to satisfy the doctrine's specified requirements. **[4]** State implementing regulations showed that PG&E's refusal either to grant Nugget's *force majeure* claim or to defer the start-up deadline for delivery of energy without Nugget's agreeing to certain concessions was a foreseeable result of state policy, and satisfied the clear articulation requirement of the state action doctrine. **[5]** Nugget's contention that PG&E performed these acts in bad faith, and therefore in contravention of state policy, was of no avail. Thus, Nugget's allegations of bad faith had no effect on the conclusion that PG&E's actions with respect to Nugget's *force majeure* claims satisfied the clear articulation require-

ment of the state action doctrine. **[6]** Nugget also argued that PG&E's handling of its *force majeure* claims failed to satisfy the second requirement of the state action doctrine: active supervision. However, PG&E's published Commission decisions and the state guidelines were sufficient to prove that the state actively supervises PG&E's handling of *force majeure* claims. This supervision along with PG&E's showing that its actions with respect to Nugget's *force majeure* claims are a foreseeable result of state policy showed that PG&E is immune from antitrust liability for its actions concerning Nugget's *force majeure* claims. **[7]** However, because PG&E failed to show that its actions concerning Nugget's interconnection plan are the foreseeable result of state policy, they were not immune under the state action doctrine. **[8]** However, the court's determination that PG&E's alleged actions concerning Nugget's interconnection plan were not immune did not automatically require reversal of the district court's dismissal of Nugget's antitrust claims. **[9]** Instead, the court held that Nugget failed to state a cognizable monopolization claim against PG&E and thus any antitrust claim.

[10] The court also held that the district court did not abuse its discretion by denying Nugget leave to amend its RICO claim. Nugget's amended complaint failed to allege that PG&E's racketeering acts had any relationship with other utilities, so as to enhance their market dominance or otherwise. **[11]** The court next considered whether Nugget's proposed amended complaint must allege that Nugget was injured by PG&E's investment of its alleged racketeering income. **[12]** The court agreed with other circuits that a RICO plaintiff must make such a showing. Nugget did not do so. Consequently, its proposed amended complaint failed to state a RICO claim.

[13] The court vacated that part of the district court judgment dismissing the state law claims and remanded for a consideration of the asserted diversity jurisdiction in Nugget's proposed amended complaint. **[14]** Also, because the court

affirmed the dismissal of all of Nugget's federal claims as a matter of law, the court did not need to consider the district court's decision concerning Nugget's motion to compel production of documents, except as they related to the state law claims.

COUNSEL

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Terry J. Houlihan, McCutchen, Doyle, Brown & Enersen, San Francisco, California, for the defendant-appellee.

OPINION

WALLACE, Chief Judge:

Nugget Hydroelectric, L.P. (Nugget) appeals from the district court's judgment in favor of Pacific Gas & Electric Company (PG&E) based upon dismissal of its claim under section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and the district court's denial of leave to amend its claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. Nugget also challenges the district court's order denying Nugget leave to amend its state law claims and dismissing them. Nugget further contends that the district court improperly refused to reconsider the magistrate judge's denial of a discovery request and imposition of sanctions under Federal Rule of Civil Procedure 11. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, and vacate in part and remand.

I

PG&E is a California public utility that buys, sells, and distributes electricity under the regulation of the California Pub-

lic Utility Commission (Commission). In 1984, PG&E entered into three power purchase agreements with Nugget's predecessor-in-interest, Enviro Hydro (Hydro), which planned to be a private power supplier. PG&E agreed to purchase energy at a certain price over a 30 year period from three Hydro projects, which were to be built in eastern California on federal land. The power purchase agreements provided that they would terminate if the projects failed to commence delivery of energy by November 5, 1989, five years after their execution. The agreements also provided that the delivery deadline could be extended in the event of a *force majeure* occurrence.

Nugget acquired Hydro's interest in the power purchase agreements in 1988, about one year before the deadline. At that time, Hydro had neither begun construction of any of the three projects nor secured the necessary permits from various government agencies. Nugget first sought from PG&E a *force majeure* extension of the power delivery deadline, pointing to permitting delays. *Force majeure* "refers to uncontrollable or unforeseeable circumstances or actions which would relieve one party in a contract from certain obligations." Commission Guidelines Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities (Guidelines), 29 C.P.U.C.2d 415, 431 (1988). PG&E initially denied Nugget's *force majeure* claim, but later offered a deferral if Nugget would agree to certain price concessions and waive all potential *force majeure* claims. Nugget rejected PG&E's offer, and tried to meet the deadline. Nugget and PG&E discussed various interconnection plans: the means by which the energy produced by Nugget's power projects would be delivered to PG&E. In August, PG&E represented to Nugget that one of these plans was preferable and that it would cost Nugget an estimated $260,000-$270,000. In October, PG&E notified Nugget that it had approved in principle the interconnection plan and was prepared to produce a final estimate of cost. Nugget authorized PG&E to proceed.

In February 1989, PG&E sent Nugget its final analysis of the interconnection plan, which deviated substantially from PG&E's earlier representations. Among other things, it estimated that the plan would cost Nugget $825,520 and would not be ready to begin delivering power until six weeks after the deadline. In addition, PG&E advised Nugget that it might be required to reimburse PG&E for unknown "take or pay" energy costs pursuant to a contract between the Placer County Water Authority and PG&E, but PG&E refused to disclose to Nugget the contract's provisions. PG&E also advised Nugget that operation of the plan was contingent upon the consent of a third party landowner, who, according to PG&E, refused to agree. However, two days later Nugget approached the landowner and secured the requisite consent with ease.

These events proved disquieting to Nugget's lender, Credit Suisse, and in April 1989, it declared a default of the loan agreements and withdrew its financial support of Nugget's projects. Seven months later, Nugget filed for bankruptcy protection.

II

The district court dismissed Nugget's antitrust claim under Federal Rule of Civil Procedure 12(b)(6) because it determined that PG&E was immune from antitrust liability under the state action doctrine. *Parker v. Brown*, 317 U.S. 341 (1943) (*Parker*). We review Nugget's dismissal de novo. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 835 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

A.

Nugget first argues that the state action doctrine has been preempted as to utilities by the Public Utility Regulatory Policies Act of 1978 (Act), Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 30, 42, and 43 U.S.C.). The specific section of the Act on which Nug-

get relies provides that "[n]othing in this Act or in any amendment made by this Act affects . . . the applicability of the antitrust laws to any electric utility or gas utility (as defined in section 3202 of Title 15)." 16 U.S.C. § 2603(1). Nugget contends that the phrase "antitrust laws" refers only to statutory law and does not encompass the common law state action doctrine.

[1] The Act's definition of "antitrust laws" "includes the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the Wilson Tariff Act, and the Act of June19, 1936, chapter 592." 16 U.S.C. § 2602(1) (citations omitted). The definition's use of the word "includes" suggests that the phrase "antitrust laws" may encompass more than just these statutes. *See Highway & City Freight Drivers v. Gordon Transps., Inc.*, 576 F.2d 1285, 1289 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978); *American Fed'n of Television & Radio Artists v. NLRB*, 462 F.2d 887, 889-90 (D.C. Cir. 1972); *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957). In interpreting another statute, the Supreme Court has held that the term "laws" encompasses both statutes and court decisions. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). We conclude that the phrase "antitrust laws" embraces not only the text of the Sherman Antitrust Act and the other listed statutes, but also the courts' interpretations of them. The state action doctrine is an interpretation of the Sherman Antitrust Act, *see Parker*, 317 U.S. at 350-51, of which Congress was aware, *see Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 319-20 (1983), when it chose the phrase "antitrust laws." The plain meaning of section 2603(1) thus establishes that the Act is to have no effect on the applicability of the state action doctrine to gas and electric utilities like PG&E.

[2] Nugget argues that the legislative history reveals that Congress clearly intended that, with respect to gas and electric utilities, the Act would preempt the state action doctrine. However, because the meaning of section 2603(1) is clear and

fails to compel an absurd result, we are discouraged from examining its legislative history. *See United Air Lines v. McMann*, 434 U.S. 192, 199 (1977) ("legislative history . . . is irrelevant to an unambiguous statute"); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) ("Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989); *In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988). We will look no further than the face of the statute.

B.

[3] Nugget argues in the alternative that even if the state action doctrine were available to gas and electric utilities, the doctrine does not protect PG&E's conduct because it fails to satisfy the doctrine's requirements as described in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980) (*Midcal*). Private party conduct is immune from antitrust liability only if the party claiming immunity shows that its conduct satisfies two requirements. First, it must be "clearly articulated and affirmatively expressed as state policy." *Id.* at 105 (internal quotation marks omitted). This may be satisfied if the conduct is a "foreseeable result" of the state's policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 42 (1985). Second, the conduct must be "actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). This is satisfied only if "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (*Patrick*); *see Federal Trade Comm'n v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2179 (1992) (*Ticor*).

Nugget alleges that PG&E engaged in several anticompetitive acts. Three involve PG&E's handling of Nugget's *force majeure* claim: PG&E (1) refused to grant Nugget's *force majeure* claim, (2) conditioned deferral of the delivery deadline on unreasonable price concessions by Nugget, and (3) negotiated deferral in bad faith. Four other alleged acts appear to concern PG&E's handling of Nugget's interconnection plan: PG&E (1) lied to Nugget when explaining why PG&E could not honor its obligations under the power purchase agreements, (2) withheld from Nugget information that its interconnection plan would not work, (3) demanded reimbursement for inflated costs for the plan's special facilities, and (4) imposed unreasonable, dilatory, or economically prohibitive conditions on the plan. Nugget argues that PG&E has failed to show that any of these acts satisfies either requirement of clear articulation or active supervision.

1.

[4] We first address the acts Nugget alleges PG&E committed with respect to Nugget's *force majeure* claim. PG&E contends that this conduct is plainly authorized by a state statute, Cal. Pub. Util. Code § 2821(b), and state implementing regulations, i.e., the Guidelines. Section 2821(b) authorizes the Commission to "specify the prices, terms, and conditions" for the sale of power by a private power producer like Nugget to a utility. The Guidelines provide that private power producers generally bear the risk of failing to develop their power facility before the five year deadline, and that only rarely will permitting delays qualify as *force majeure* events. 29 C.P.U.C.2d at 431, 432. The Commission "expect[s] the utility to carefully scrutinize each claim of force majeure, consistent with these guidelines, and negotiate only in instances where it is convinced that a settlement, versus adjudication, is in the ratepayers' best interest." *Id.* at 432. The Guidelines demonstrate that PG&E's refusal either to grant Nugget's *force majeure* claim or to defer the start-up deadline without Nugget's agreeing to certain concessions was a foreseeable result of

state policy, and therefore satisfies the clear articulation requirement of the state action doctrine.

[5] Nugget's contention that PG&E performed these acts in bad faith, and therefore in contravention of state policy, is to no avail. In *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985), we rejected a claim that the bad faith behind the anti-competitive conduct of certain government officials destroyed their immunity under the state action doctrine, stating that it

> does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker [v. Brown*, 317 U.S. 341 (1943),] and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty. A contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

Id. at 774. This reasoning applies equally to all defendants, private as well as public. Therefore, Nugget's allegations of bad faith have no effect on the conclusion that PG&E's actions with respect to Nugget's *force majeure* claims satisfy the clear articulation requirement of the state action doctrine.

2.

[6] Nugget also argues that PG&E's handling of its *force majeure* claims fails to satisfy the second requirement of the state action doctrine: active supervision. PG&E argues that under the Guidelines its conduct is actively supervised by the state. They provide that a qualified power producer who believes that the utility has failed to bargain over contract modifications with it in good faith may file a formal complaint with the Commission. 29 C.P.U.C.2d at 428. This provision shows that state officials have the power to review

PG&E's actions with respect to *force majeure* claims, but fails to satisfy the requirement that they in fact exercise their power. *See Ticor*, 112 S. Ct. at 2179; *Patrick*, 486 U.S. at 101. To demonstrate this, PG&E cites a series of published Commission decisions that have reviewed *force majeure* claims and settlement agreements involving PG&E and private power producers. *See, e.g., Sayles Hydro Assocs. v. Pacific Gas & Elec. Co.*, C.P.U.C. Decision No. 90-12-074, 1990 Cal. PUC LEXIS 1393 (Dec. 19, 1990); *Pacific Gas & Elec.*, 36 C.P.U.C.2d 463 (1990); *Pacific Gas & Elec.*, 36 C.P.U.C.2d 342 (1990); *Pacific Gas & Elec.*, 30 C.P.U.C.2d 56 (1988). The existence of these decisions is a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Nugget had an opportunity at oral argument to argue against our consideration of them. *See id.* at 201(e). We may therefore take judicial notice of these decisions. *See id.* at 201; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1403 & n.2 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *United States v. Camp*, 723 F.2d 741, 744 n.** (9th Cir. 1984). These decisions and the Guidelines are sufficient to prove that the state actively supervises PG&E's handling of *force majeure* claims. This supervision along with PG&E's showing that its actions with respect to Nugget's *force majeure* claims are a foreseeable result of state policy demonstrates that PG&E is immune from antitrust liability for its actions concerning Nugget's *force majeure* claims.

3.

[7] We turn now to PG&E's actions surrounding Nugget's interconnection plan. Nugget contends that PG&E has failed to show that this conduct satisfies either requirement of clear articulation or active supervision. We need go no farther than to hold that PG&E did not demonstrate the clear articulation requirement. PG&E failed to offer any state statute, regulation, or other authority suggesting that PG&E's conduct relating to the interconnection plan was a foreseeable result of

state policy. Instead, PG&E contends that Nugget did not allege that these actions either injured Nugget or had an effect on competition. Although these omissions may be *relevant to* determining whether Nugget has stated an antitrust claim, they are irrelevant to determining whether PG&E has shown that the acts Nugget alleges PG&E committed are entitled to immunity. Because PG&E has failed to show that its actions concerning Nugget's interconnection plan are the foreseeable result of state policy, they are not immune under the state action doctrine.

C.

[8] Our determination that PG&E's alleged actions concerning Nugget's interconnection plan are not immune does not automatically require us to reverse the district court's dismissal of Nugget's antitrust claim. We may affirm the district court on any ground supported by the record. *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987). PG&E argues that we should affirm the dismissal of Nugget's antitrust claim based upon the interconnection because it has failed to state a monopolization or attempted monopolization claim under 15 U.S.C. § 2.

[9] In order to state a valid monopolization claim, Nugget must allege: (1) possession of monopoly power in a relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (*Catlin*). PG&E argues that Nugget has failed to allege the second element. Nugget contends that it could have generated and sold power in interstate commerce in competition with PG&E, and that by causing Nugget's demise PG&E enhanced its monopoly power. Perhaps so, but Nugget's complaint alleges instead that Nugget planned to be a supplier to PG&E. Therefore, Nugget's failure could not have helped PG&E acquire or maintain monopoly power. In its reply brief, Nugget alternatively contends that its bankruptcy allowed PG&E to enhance

its monopoly power because this would enable it to build its own additional power supply, and increase its rate base and income. Because Nugget failed to raise this argument in its opening brief, it is waived. *See Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). We hold that Nugget has failed to state a cognizable monopolization claim against PG&E.

In order to state an attempted monopolization claim, Nugget must allege: (1) specific intent to monopolize a relevant market; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success. *Catlin*, 791 F.2d at 1348. Nugget has failed to satisfy the third element of the attempted monopolization claim for the same reasons that Nugget failed to satisfy the willful acquisition or maintenance of power element for the monopolization claim. Therefore, we affirm the district court's dismissal of Nugget's antitrust claim with respect to PG&E's actions regarding Nugget's interconnection plan on the basis that Nugget failed to state an antitrust claim.

III

Nugget argues that the district court erred by denying leave to amend its RICO claims. Nugget contended before the district court and argues to us that its proposed amended complaint adequately alleges that it was injured by PG&E's violations of sections 1962(a) and 1962(c). The district court disagreed. We review the denial of leave to amend for abuse of discretion. *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3843 (U.S. Oct. 5, 1992).

A.

Turning first to Nugget's claim under section 1962(c), the issue before us is whether its proposed amended complaint alleges facts showing a nexus between PG&E's alleged racke-

teering acts and the conduct of the enterprise. Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." To state a claim under this section, Nugget must allege a nexus between the enterprise and the racketeering activity by showing that the racketeering activity "in some way stem[s] from the enterprise's activities or otherwise ha[s] some relationship to the enterprise." *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 195 (9th Cir. 1987).

[10] Nugget's proposed amended complaint fails to do this. It alleges that the enterprise, consisting of certain California utilities including PG&E, intended to "maintain the dominance of its members in the generation and sale of electric power within California." Although we do not require a plaintiff to allege that the racketeering activity benefited the enterprise, we do require some kind of relationship, *see id.*, and Nugget's amended complaint fails to allege that PG&E's racketeering acts had any relationship with these other utilities, to enhance their market dominance or otherwise. The argued nexus rests on the assumption that Nugget is a competitor of the enterprise members, but it is clear from the amended complaint that Nugget planned to be a supplier to PG&E. Because this defect would render Nugget's section 1962(c) claim subject to dismissal, the district court did not abuse its discretion by denying Nugget leave to amend this part of its complaint. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

B.

[11] We next consider whether, under section 1962(a), Nugget's proposed amended complaint must allege that Nugget was injured by PG&E's investment of its alleged racketeering income. The Ninth Circuit has not yet decided this question. *See Reddy v. Litton Indus.*, 912 F.2d 291, 295-96

(9th Cir. 1990), *cert. denied*, 112 S. Ct. 332 (1991). However, three of the four circuits to consider this question have determined that the plain language of sections 1964(c) and 1962(a) read together require that a RICO plaintiff make such a showing. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990) (*Ouaknine*); *Rose v. Bartle*, 871 F.2d 331, 356-58 (3d Cir. 1989) (*Rose*); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir.) (*Grider*), *cert. denied*, 493 U.S. 820 (1989); *but see Busby v. Crown Supply, Inc.*, 896 F.2d 833, 837-38 (4th Cir. 1990).

[12] In determining the elements of a RICO claim, we first examine the language of the statute. *See Russello v. United States*, 464 U.S. 16, 20 (1983). Section 1964(c) provides a civil damage remedy only to those persons who are injured "by reason of a violation of section 1962." Section 1962(a) provides that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in . . . operation of . . . any enterprise." The plain language of these two provisions leads us to conclude that a plaintiff seeking civil damages for a violation of section 1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income. Thus, we agree with the Second, Third, and Tenth Circuits. *See Ouaknine*, 897 F.2d at 82-83; *Rose*, 871 F.2d at 358; *Grider*, 868 F.2d at 1149.

Nugget urges us to follow the Fourth Circuit's decision in *Busby*, which held that a RICO plaintiff bringing an action for a violation of section 1962(a) need only allege facts showing an injury from the racketeering acts that generated income that was subsequently used in violation of the section. *See* 896 F.2d at 837-38. *Busby* reasoned that this reading of RICO is compelled in part by the expansiveness of the phrase "by reason of" in section 1964(a), which allows recovery, "despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury." *Id.*

at 838. We conclude that section 1964(c) does not support such a reading, for it would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an "element of a violation" but rather only of a "violation." To allow recovery for an injury arising from a mere element of a violation, rather than an actual violation, of section 1962(c), we would have to have before us a statute worded differently from the one Congress passed. Separation of powers principles and the value of democratic rule prohibit us from "interpreting" the statute such that we are, in fact, amending section 1964.

Nugget alternatively contends that it has complied with our adopted standard because it alleged the elements of a civil claim under section 1962(a) by alleging that PG&E received racketeering income and used it in a way that injured Nugget. Nugget made some allegations to this effect, but they are general, conclusory, and vague. Thus, Nugget's proposed amended complaint fails to state a claim under section 1962(a). *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982).

As with its section 1962(c) claim, Nugget's proposed amended complaint fails to state a claim under section 1962(a), and would be subject to dismissal; therefore, the district court did not abuse its discretion by denying Nugget leave to amend its complaint.

IV

Nugget contends that the district court abused its discretion by dismissing its state law claims without allowing it leave to amend. Nugget asserted diversity jurisdiction. It was required to specify affirmatively the citizenship of all relevant parties,

see Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983), which in the case of a limited partnership such as Nugget, are the partners. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990). Nugget failed to comply with these requirements in its original complaint, although PG&E raised the issue. Nine months after this warning, Nugget finally attempted to take curative action in response to PG&E's motion for judgment on the pleadings. At that time, it submitted a proposed amended complaint that removed the defect.

The district court dismissed without prejudice these counts on the basis that it had dismissed the counts based upon federal question jurisdiction, and, therefore, these pendent counts should be dismissed. The court referred to the unsuccessful effort to plead diversity jurisdiction in the complaint, but did not consider the new jurisdictional allegations in the amended complaint, which properly allege diversity jurisdiction. It should have done so.

[13] PG&E argues that we need not reverse because Nugget's efforts are too late. The district court may deny leave to amend for undue delay. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Nugget explains that it delayed because "jurisdiction over Nugget's federal RICO claims was vested in the district court." We need not and should not reach this issue, as it was not first presented to the district court. We vacate that part of the judgment dismissing the state law claims and remand for the district court to consider the asserted diversity jurisdiction in Nugget's proposed amended complaint.

V

[14] Nugget argues that the district court abused its discretion by refusing to vacate the order of the magistrate judge denying Nugget's motion to compel production of documents and imposing sanctions under Federal Rule of Civil Procedure 11. Because we have affirmed the dismissal of all of Nugget's

federal claims as a matter of law, we need not consider the district court's decision with respect to Nugget's motion to compel production of documents, except as they relate to the state law claims.

Nugget was required to prove fraudulent intent for its California law fraud claim. Nugget argues that its requested discovery was necessary to prove this claim. Nugget's allegations of fraud encompass only the misrepresentations it alleges PG&E made with regard to the cost and feasibility of the interconnection. Most of these alleged misrepresentations relate to Placer County Water Authority projects, whose existence was allegedly inimical to Nugget's interconnection plan.

Nugget's document request, however, demanded millions of pages of documents concerning every aspect of PG&E's relationships with private power suppliers, only a fraction of which could be deemed relevant to the subject matter of Nugget's fraud claim. The magistrate had adequate grounds to determine that most of the requested documents fall outside the scope of discovery articulated in Federal Rule of Civil Procedure 26(b)(1). The magistrate's conclusion that Nugget's request was unnecessarily burdensome and overly broad is based upon Nugget's failure to make a "specific showing that the burdens of production would be minimal and that the requested documents would lead to relevant evidence." *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987). The district court did not abuse its discretion in refusing to grant Nugget's motion to reconsider the magistrate's order denying Nugget's motion to compel.

A separate issue is whether Rule 11 sanctions were properly granted. We review the district court's denial of a motion for reconsideration of a magistrate's imposition of sanctions for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see Yusov v. Yusuf*, 892 F.2d 784, 788 (9th Cir. 1989).

Rule 11 sanctions were imposed on Nugget for filing a second motion to compel. Sanctions must be imposed on a signer of a paper if the paper either is filed for an improper purpose or is frivolous. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). The standard governing this inquiry is an objective one, based on what was reasonable under the circumstances. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986).

The magistrate judge imposed sanctions because Nugget's second motion to compel largely duplicated its first motion to compel, which earlier had been denied and from which denial no motion for reconsideration was filed. The magistrate judge therefore decided that the pleading was filed for the improper purpose of harassing PG&E. Nugget's two motions to compel are sufficiently similar so that the district court did not abuse its discretion by refusing to vacate the order of the magistrate judge imposing Rule 11 sanctions on Nugget for filing the second motion to compel production of documents.

Nugget lastly contends that the amount of the sanctions awarded by the magistrate judge was excessive. We also review the amount of a sanctions award for abuse of discretion. *See id.* at 828.

The magistrate judge sanctioned Nugget in the form of attorneys' fees in the amount of $10,042. PG&E argues that because Nugget failed to file a notice of appeal from this decision, or exhaust its district court remedies pursuant to Local Rule 410-2(a), we may not consider Nugget's contention. *See Burt v. Hennessey*, 929 F.2d 457, 458 (9th Cir. 1991). Nugget contends that it should be excused for such failure because it did not receive notice of the fee award from the court, and only learned of it from PG&E the day Nugget submitted its brief on appeal. Assuming, without deciding, that Nugget's excuse is satisfactory, based on our review of the record, we hold that the magistrate judge did not abuse his discretion by imposing the attorneys' fees as a sanction.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED
OCT 5, 1990
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

NUGGET HYDROELECTRIC, L.P.,	Case No.: C-90-1248-JPV
Plaintiff,	ORDER REGARDING RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS CLAIMS AND DISMISSING ANTITRUST CLAIMS
v.	
PACIFIC GAS & ELECTRIC COMPANY,	
Defendant.	

INTRODUCTION

Defendant's Motion to Dismiss and for Rule 11 Sanctions was scheduled to be heard on September 6, 1990. After a review of the briefs, this court considered it appropriate to submit the motions on the pleadings pursuant to Local Rule 220-1, and now in part grants and in part denies the motions, and orders plaintiff to file a RICO Statement.

BACKGROUND

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate "if plaintiff's allegations, taken as true, fail to state a claim for which the court may grant relief." *Massey v. Inland Boatmen's Union,* 886 F.2d 1188, 1189 (9th Cir. 1989). This is clearly the case with

regard to plaintiff's antitrust claims. Even construing the complaint liberally, this court could not find in plaintiff's favor on those claims as a matter of law, because of the doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943) (no antitrust violation for actions compelled and regulated by the state). In the dealings between defendant and plaintiff alleged in the complaint, defendant was following a clearly articulated and directly supervised state policy, so the standard of *Parker* is met, and the antitrust claims should be dismissed. But since plaintiff's claims were based on an argument for the modification of existing law, Rule 11 sanctions are not appropriate.

ORDER

In accordance with the foregoing discussion, it is HEREBY ORDERED as follows:

1. Antitrust Claims.

Defendant's Motion to Dismiss is GRANTED as to the complaint's antitrust claims;

2. RICO Claims.

Racketeer Influenced and Corrupt Organizations ("RICO") 18 U.S.C. ¶ 1961 claim(s) have been set forth in this action. In order to clarify the issues herein and prevent abuse of the RICO statutes, plaintiff is HEREBY ORDERED TO FILE a "Rico Statement" as directed below. Defendant's Motion to Dismiss is DENIED with respect to the complaint's RICO claims, but failure of plaintiff to comply with this Order will be deemed grounds for dismissal of his RICO claims.

Plaintiff shall file and serve, within twenty (20) days of the filing of this Order, a "RICO Statement." This statement shall include the facts plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Federal Rule of Civil Procedure 11, and, in particular, this statement shall be in

a form that uses the numbers and letters set forth below, and shall state in detail and with specificity the following information:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. ¶ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following informations:

(a) List the alleged predicate acts and the specific statutes that were allegedly violated;

(b) Provide the dates of the predicate acts, participants in the predicate acts, and a description of the facts surrounding the predicate acts;

(c) If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place, and contents of the alleged misrepresentations, and the identity of persons to whom any by whom the alleged misrepresentations were made;

(d) State whether there has been a criminal conviction for violation of the predicate acts;

(e) State whether civil litigation has resulted in a judgment in regard to the predicate acts;

(f) Describe how the predicate acts form a "pattern of racketeering activity"; and

(g) State whether the alleged predicate acts relate to each other as parts of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

(a) State the names of the individuals, partnerships, corporations, associations, or other legal entities that allegedly constitute the enterprise;

(b) Describe the structure, purpose, function, and course of conduct of the enterprise;

(c) State whether any defendants are employees, officers, or directors of the alleged enterprise;

(d) State whether any defendants are associates with the alleged enterprise;

(e) State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself; or members of the enterprise; and

(f) If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise or interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

(a) State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

(b) Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 8 U.S.C. § 1962(c), provide the following information:

(a) State who is employed by or associated with the enterprise; and

(b) State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained for which each defendant is allegedly liable.

18. List all other federal causes of action stated in the complaint, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the Court in processing your RICO claim;

3. Pendent State Law Claims.

Defendant's Motion to Dismiss is DENIED with respect to the complaint's state law claims, since that portion of the Motion relied on dismissal of all the federal claims.

4. Rule 11 Sanctions.

Defendant's Request for Rule 11 Sanctions is DENIED.

IT IS SO ORDERED
DATED: October 5, 1990

AJC

J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL FILED
APRIL 22, 1991
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

NUGGET HYDRO-ELECTRIC, L.P.,	)
	) No. C-90-1248-JPV
Plaintiff,	) ORDER GRANTING MO-
	) TION FOR JUDGMENT
v.	) ON THE PLEADINGS,
	) DENYING CROSS MO-
PACIFIC GAS AND ELECTRIC CO.,	) TION FOR LEAVE TO
	) AMEND, AND DISMISS-
	) ING PENDANT STATE
Defendant.	) CLAIMS
	)

INTRODUCTION

Defendant's Motion for Judgment on the Pleadings, and Plaintiff's Cross Motion for Leave to Amend, were scheduled to be heard on April 18, 1991. After a review of the briefs, this court considered it appropriate to submit the motions on the pleadings pursuant to Local Rule 220-1, and now GRANTS defendant's motion, DENIES plaintiff's motion, and DISMISSES the pendant state law claims *sua sponte.*

BACKGROUND

The complaint in this case contained antitrust, civil RICO, and pendant state law causes of action. The antitrust claims were dismissed as being utterly without legal basis by Order dated October 5, 1990. In that Order, this court also required plaintiff to file a detailed RICO Statement, in an effort to clarify the complaint's

purported RICO claims. Plaintiff filed a RICO Statement, and defendant now moves for judgment on the pleadings under Rule 12(c) dismissing the RICO claims. Notwithstanding plaintiff's frantic last minute flailing in search of a theory to support its complaint, the RICO claims must be dismissed.

DISCUSSION

Plaintiff seeks, in its Complaint and RICO Statement as well as its proposed First Amended Complaint, to state claims under 18 U.S.C. §§ 1962(a) and 1962(c). No amount of amendment could overcome the fundamental flaws in these purported causes of action, so they should be dismissed with prejudice. Since such dismissal would deprive this court of the basis for its exercise of pendant jurisdiction over the remaining state claims, those claims should be dismissed as well.

1. Standard on Rule 12(c) Motion.

The standard of review on a motion for judgment on the pleadings under Rule 12(c) is the same as that applied to a motion to dismiss under Rule 12(b)(6). *Dworkin v. Hustler Magazine,* 867 F.2d 1138, 1192 (9th Cir.), *cert. den.* 110 S.Ct. 59 (1989). The motion amounts to a motion to dismiss filed after the defendant has answered the complaint. 5A Wright & Miller, *Federal Practice and Procedure* § 1367. This principle is especially apposite here, since the court did not address defendant's initial motion to dismiss the RICO claims on its substance, but rather delayed the process by requiring the plaintiff to file a RICO statement. Therefore, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

It should be noted that the RICO Statement is a pleading for purposes of a Rule 12(c) motion. It is in essence nothing more than an expansion of the complaint, designed to assist the court and the parties in clarifying the issues and the factual allegations in what are often highly complex cases. Perhaps one of the RICO Statement's most useful functions, illustrated in this case, is to weed out at an early stage cases in which a party seeks to use the RICO statutes to accomplish something other than the statutes' intended objectives.

2. RICO Claims under §§ 1962(a) and (c).

It is unlawful for a person who has received income from a pattern of racketeering activity to use or invest such income in the operation of an enterprise engaged in interstate commerce. 18 U.S.C. § 1962(a). Furthermore, it is unlawful for a person, employed by or associated with an enterprise engaged in interstate commerce, to conduct that enterprise's affairs through a pattern of racketeering activity. The pleadings disclose that plaintiff will find it impossible to prove that defendant violated either of these provisions.

a. No pattern of activity.

Both statutory sections require a showing of a pattern of racketeering activity, which means that the defendant's predicate acts constitute a threat of continued criminal activity. *See H.J. Inc. v. Northwestern Bell Telephone Co.,* 109 S.Ct. 2893, 2901 (1989). In particular, the period of criminal activity alleged must span more than a few months. *Id.* at 2902; *see also Service Engineering Co. v. Southwest Marine, Inc.,* 719 F.Supp. 1500, 1508 (N.D.Cal. 1989). Here, the acts upon which plaintiff relies are not criminal, and they spanned only four months. This showing, even after an opportunity to file a RICO Statement and a proffered amended complaint, is insufficient. Defendant certainly does not pose a threat of future criminal conduct where, as here, it is not shown to have engaged in past criminal conduct.

b. Defendant cannot be person and enterprise.

Plaintiff alleges that defendant plays the role of both the person and the enterprise in the § 1962(c) claim. But it is well settled that one party cannot be both a person and an enterprise under § 1962(c). *Schreiber Dist. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1396 (9th Cir. 1986); *Buran Equipment Co. v. Hydro Electric Constructors, Inc.,* 656 F.Supp. 864, 865 (N.D.Cal. 1987).

Plaintiff seeks in its proposed amendment to advance a wildly speculative theory involving an enterprise of public utilities to eliminate private power producers. Plaintiff provides not even the sketchiest of facts to support this theory, let alone naming the other utilities allegedly involved. But the essence of a § 1962(c) violation is the nexus between the alleged acts of racketeering and the conduct of the enterprise, a showing which would require far more specific allegations than plaintiff is able to muster. *See Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187, 195 (9th Cir. 1987). It is clear from the pleadings that no facts exist to support such a claim.

c. No income received.

There is no showing whatsoever that defendant derived income from any alleged actions against plaintiff. As for plaintiff's proposed curative amendment, it is again composed of a speculative theory without any supporting facts. Clearly, plaintiff is unable to plead this vital element.

d. No injury to Nugget.

Plaintiff's proposed new allegations under its whimsical "QF basher" theory deserve short shrift. There is no showing in any of the pleadings before the court of injury to plaintiff caused by alleged acts predicate to the RICO enterprise by defendant. Such predicate acts would have to be pled with the particularity required under Rule 9(b). *See Schreiber Dist. Co. v. Serv-Well Co.,* 806 F.2d 1393, 1400 (9th Cir. 1986) .

3. Pendant State Claims.

The complaint's remaining claims were before this court under its pendant jurisdiction. Since the antitrust claims have already been dismissed with prejudice, and this order dismisses the RICO claims with prejudice, no federal jurisdiction remains upon which pendant jurisdiction may be based. The recital in the complaint that this court has diversity jurisdiction over this matter is belied on the face of the complaint by the allegations on the very same page which indicate that both parties are citizens of California. Therefore, the remaining state law causes of action should be dismissed without prejudice.

4. Rule 11 Sanctions.

This court declines to impose Rule 11 sanctions on plaintiff at this stage.

ORDER

In accordance with the foregoing discussion, this court HEREBY ORDERS as follows:

1. Defendant's Motion for Judgment on the Pleadings is GRANTED;

2. Plaintiff's Cross Motion for Leave to Amend is DENIED;

3. The remaining pendant state law claims of the complaint are DISMISSED without prejudice;

4. Defendant's request for sanctions is DENIED.

IT IS SO ORDERED

DATED: April 22, 1991

By: _____
J. PJ VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL FILED
MAY 24, 1991
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NUGGET HYDRO-ELECTRIC, L.P.,	)	
Plaintiff,	)	Civil No. C-90-1248 JPV (FSL)
v.	)	
PACIFIC GAS AND ELECTRIC CO.,	)	ORDER RE DISCOVERY & SANCTIONS
Defendant.	)	

The motion of Plaintiff NUGGET HYDROELECTRIC (NUGGET) to compel production of documents by Defendant PACIFIC GAS & ELECTRIC (PG&E) and the cross-motion of Defendant PG&E for an award of sanctions against Plaintiff NUGGET were submitted on April 13, 1991 without oral argument under Local Rule 220-1. The pleadings and the record in this case having been read and considered and good cause appearing,

IT IS HEREBY ORDERED that the motion to compel production of documents be DENIED, in its entirety, and that the cross-motion for sanctions be GRANTED, in an amount to be determined by the court after counsel for PG&E submit a declaration regarding the fees incurred for the opposition to NUGGET'S motion.

Background

NUGGET is a private power producer who attempted to enter into an agreement with PG&E to

produce power which PG&E would buy at set rates under applicable state and federal statutes.

This Lawsuit

In its complaint filed April 27, 1990, NUGGET claimed that PG&E's conduct was part of a pattern of thwarting private power companies in order to maintain PG&E's monopoly on power generation in Northern California.

NUGGET asserted claims for anti-trust law violations (15 U.S.C. §2), state law claims for breach of contract and fraud and also violations of federal Racketeer Influenced Corrupt Organization ("RICO") statutes (18 U.S.C. § 1961 *et seg.*).

PROCEDURAL HISTORY

On October 5, 1990, the District Court dismissed NUGGET'S anti-trust claims and on December 3, 1990, denied NUGGET'S application for an interlocutory appeal and stay of proceedings.

On May 17, 1991, the District Court granted PG&E's Motion for Judgment on the Pleadings, denied NUGGET'S Cross-Motion for Leave to Amend, and dismissed pendant state claims. That order is being appealed to the Court of Appeals for the Ninth Circuit. While the District Court's order renders the discovery portion of this dispute moot, it does not disturb the issue of sanctions.

Preliminary Matters
Local Rule 230-4

Local Rule 230-4 requires that the parties to a discovery dispute meet and confer to make a good faith effort to resolve their dispute before filing any motion before the court. A certificate of compliance with this rule must be filed with any discovery motion papers. No such Certificate was filed with this motion. Apparently NUGGET neglected to file such a Certificate with its

previous motion as well. The court has the discretion to refuse even to consider a notion filed without the required Certificate. In the interests of judicial economy the court at this time chooses to consider the motion.

Claim of Privilege

PG&E asserts a claim of privilege for twenty-one documents responsive to NUGGET'S requests and offers a Privilege Log, as required by this court's order of January 10, 1991. NUGGET requests that the court examine the documents *in camera* and decide which, if any, to order PG&E to produce. NUGGET makes this request because there are not many documents, it cannot determine how to respond to PG&E's claim and it suspects the documents are not really privileged or would lead to important evidence. PG&E replies that NUGGET has made no attempt to contact it to object to the identification of the documents on the Privilege Log.

PG&E has complied with the court's order and the court declines to conduct an *in camera* review. Should NUGGET choose to move to compel production of specific documents, it may do so, as provided in the previous order.

This Motion

NUGGET has moved to compel responses from PG&E to NUGGET'S Second Request for Production of Documents. This Request was served while a previous motion to compel responses to NUGGET'S First Set of Requests for Production of Documents was pending before this court. January 10, 1991, before responses were due, this court filed its Order re Discovery. The Order restricted the scope of document production by PG&E to NUGGET to information and documents regarding NUGGET'S own three projects (Big Mosquito, Wallace Canyon and Long Canyon) and the Griswold Creek Project, which is the subject of a state court

lawsuit. No Motion for Reconsideration was filed with respect to that Order.

NUGGET seeks voluminous documents related to PG&E directors' meetings, workshops, policy statements and working relationships, both inside and outside the company. The purpose of this discovery would be to show that PG&E had the intent to thwart private power companies. Presumably this evidence could lead to a showing that PG&E had the intent to defraud NUGGET, and shows a pattern of activity which would support NUGGET'S claim under RICO.

NUGGET renews its request by offering on information and belief the following:

1) PG&E's Chief Executive Officer has publicly stated in 1986 and 1987 in business publications his opposition to private power development;

2) PG&E has developed a policy to obstruct private power development;

3) PG&E has conducted workshops for its employees on discouraging or preventing private power development;

4) there is a claim by a private power developer before the California Public Utilities Commission which avers improprieties by PG&E regarding a standard offer contract;

5) PG&E has itself entered the private power development arena by establishing a subsidiary, PG&E Enterprises.

Analysis

To investigate parties and transactions not directly related to its RICO claims, a party must pass two tests:

1) either plaintiff must have pleaded fraud on others or in other transactions consistent with Fed. R. Civ. P. 9(b) and 11, or

2) plaintiff must have made a *factual* showing that discovery into transactions unrelated to the RICO allegations contained in the complaint area reasonably calculated to lead to admissible evidence of *similar fraud. PMC v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990).

In this notion NUGGET seeks substantially the same documents which the court held were not discoverable in its order of January 10, 1991. NUGGET never appealed that order, which is therefor final and binding on the parties.

The District Court, in its order of February 5, 1991, affirmed that this court's order had delineated the scope of the documents which PG&E may properly be required to produce. (order at 2).

The factual evidence presented by NUGGET does not offer evidence of any unlawful conduct by PG&E related to private power companies, much less evidence of any fraud similar to that alleged by NUGGET. Nor is the evidence offered new. Much of it comes from magazine articles published in 1986 and 1987.

This court ruled on January 10, 1991 that NUGGET had failed at that time to meet the tests in *PMC*. In its renewed motion it has requested substantially the same documents and it still fails the requisite tests. NUGGET has made no factual showing that the discovery requested is reasonably calculated to lead to admissible evidence of similar fraud.

Sanctions

PG&E requests an award of its attorney's fees for opposing this motion, on the grounds that NUGGET is in effect trying to circumvent this court's order of January 10, 1991 by filing a new motion based on frivolous claims of "new" extrinsic evidence of conduct by PG&E.

Fed. R. Civ. P. Rule 11 requires that an attorney signing a pleading certifies that to the best of the

signer's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

NUGGET has filed this motion, requiring a detailed response from PG&E, without offering any substantive basis for its contentions. It offers no new relevant facts, no new law and no argument for the extension of existing law. In effect it has attempted to re-litigate a previous motion, which it lost, where it had not filed a Motion for Reconsideration. The only possible purpose which the court can discern for such an action is harassment, delay and increasing the cost of litigation. Such duplicative litigation, which wastes the time of the court as well as the opposition, should be discouraged. One way is by awarding sanctions against the offending party.

Conclusion and Order

Accordingly the court awards attorney's fees to be paid by NUGGET to PG&E. The amount of the fees will be determined by the court after submission of a declaration by PG&E.

SO ORDERED.

Dated: May 24, 1991

F. STEELE LANGFORD

F. Steele Langford
Chief Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
JULY 11, 1991
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NUGGET HYDRO-ELECTRIC, L.P.,	)	No. C-90-1248-JPV
Plaintiff,	)	ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL RECONSIDERATION, DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, AND DENYING DEFENDANT'S MOTION FOR SANCTIONS
v.	)	
PACIFIC GAS AND ELECTRIC CO.,	)	
Defendant.	)	

Defendant's Motion for Partial Reconsideration, Plaintiff's Motion for Reconsideration, and Defendant's Motion for Sanctions were scheduled to be heard on July 11, 1991. After a review of the briefs, this court considered it appropriate to submit the motions on the pleadings pursuant to Local Rule 220-1, and now DENIES the motions.

Defendant requests that this court reconsider that portion of its Order dated April 22, 1991 which dismissed Nugget's state law claims. Defendant's argument is based on the technical argument that this court failed to enter a separate judgment to conclude the case. As is evident from the terms of the Order, this court fully intended the April 22, 1991 Order to conclude this case.

As for the motions regarding the Magistrate's ruling, plaintiff fails to demonstrate that the ruling was clearly erroneous or contrary to law. Plaintiff was entitled,

however, to bring the matter before this court under Local Rule 410-2(a), so sanctions are not appropriate. Therefore, it is HEREBY ORDERED as follows:

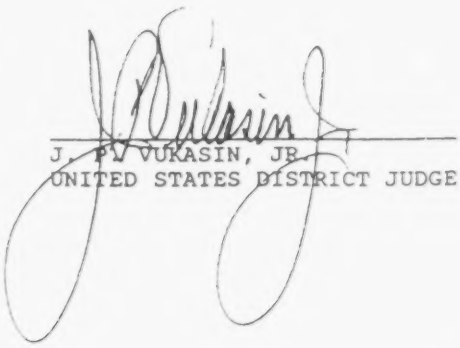
1. Defendant's Motion for Partial Reconsideration is DENIED;

2. The Clerk of this court is DIRECTED to file *nunc pro tunc* to April 22, 1991 the document entitled "Judgment" signed in this action by this court;

3. Plaintiff's Motion for Reconsideration is DENIED;

4. Defendant's Motion for Sanctions is DENIED.

IT IS SO ORDERED
DATED: July 11, 1991



J. P.J. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

FILED
APR 9 1993

No. 92-1463

In The

Supreme Court of the United States

October Term, 1992

NUGGET HYDROELECTRIC, L.P.,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 9, 1993

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The petition for certiorari misstates the questions presented by this case. If the Court were to grant certiorari, the questions presented would be:

1. Did PG&E, a California utility, "willfully" monopolize the "sale and/or distribution" of electric power in northern California in violation of Sherman Act Section 2 by initially misleading Nugget, a limited partnership formed solely to develop three small hydroelectric projects, about project interconnection costs to prevent Nugget from selling their entire output to PG&E under thirty-year contracts without which the projects were not economically viable?

2. Is a RICO section 1962(a) claim stated where the plaintiff alleges injury from "predicate acts" but not that such acts generated income for the defendant nor that use of such income injured plaintiff?

3. Did the federal magistrate acting as discovery master abuse his discretion by imposing sanctions on a party for filing a duplicative discovery motion intended to harass, delay and increase the cost of litigation?

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No. 92-1463

In The

Supreme Court of the United States

October Term, 1992

NUGGET HYDROELECTRIC, L.P.,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Pacific Gas and Electric Company ("PG&E")[1] opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

[1] PG&E certifies pursuant to Sup. Ct. R. 29.1 that no parent or subsidiary of PG&E exists, other than wholly-owned subsidiaries.

INTRODUCTION

This case is merely an attempt to turn a commercial contract dispute into an antitrust and RICO case. Sophisticated corporate investors attempted unsuccessfully to take advantage of three standardized contracts imposed on PG&E by regulation. They failed. The issues arising from the petition do not warrant this Court's attention.

STATUTES AND RULES INVOLVED

With the following addition, the statutory provisions and rules cited by Nugget are adequate:

18 U.S.C. Section 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Supreme Court Rule 10:

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

STATEMENT OF THE CASE

The facts relating to the dispute are derived from pleadings of Nugget Hydroelectric, L.P. ("Nugget"), the Petitioner in this Court. In granting PG&E's motions to dismiss and for judgment on the pleadings, the district

court accepted the allegations of the complaint and Nugget's RICO Statement as true.[2]

A. Facts alleged.

With the following additions and clarifications, Nugget's statement of the facts is adequate:

No construction ever commenced on any project; Nugget never secured the state and federal permits necessary for construction to proceed. Complaint at ¶¶ 25 and 28.

Nugget's characterization of facts relating to the PG&E interconnection estimates claimed to constitute fraud is misleading. PG&E did not simply represent to Nugget in August 1988 that a particular interconnection point "was preferable and would cost Petitioner an estimated $260,000 to $270,000." Petition ("Pet.") at 6.

Rather, the complaint alleges that PG&E "agreed that Nugget's proposed new interconnection [which was selected by Nugget's attorney] represented the 'preferable location' " to an alternate suggested by Nugget's consultant. Complaint at ¶ 35. PG&E had earlier suggested a third alternative. The complaint also states that

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[2] A RICO Statement is sometimes required by a court "where the pleader is so obviously in need of a roadmap if he or she hopes to state a potentially viable RICO claim." *Stich v. Lucas*, 1990 U.S. Dist. LEXIS 7453 at 5 (N.D. Ill. 1990). For the purposes of a motion to dismiss or motion for judgment on the pleadings, a RICO Statement operates as a pleading. *Greek Radio Network of America v. Vlasopoulos*, 731 F. Supp. 1227, 1234 n.12 (E.D. Pa. 1990).

PG&E "indicated that the new interconnection point [suggested by Nugget's attorney] would require a switch, which might increase total interconnection costs to $550,000.00." *Id.* at ¶ 36. It further alleges that PG&E informed Nugget that the estimate cost could be reduced to between $260,000 and $270,000 *if* "Nugget could procure a refurbished switch. . . . " *Id.* The higher formal estimate supplied later by PG&E of approximately $825,000 is not alleged to have assumed any contribution of equipment by Nugget and is not alleged to have been inaccurate.

Nugget implies that its lender, Credit Suisse, withdrew its financial support because of PG&E's interconnection study. The complaint, however, has only a vague allegation attributing the financing withdrawal generally to all actions by PG&E, including its refusal to extend, on a *force majeure* theory, the five-year deadline for construction of the projects. That refusal alone, not challenged here, rendered the projects uneconomic regardless of interconnection cost:

> No electric utility other than PG&E or other substantial purchaser of electric power maintains facilities within sufficient proximity to any of the projects to afford an alternate market for the electricity to be generated by them.

Complaint at ¶ 13.[3]

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[3] Both the District Court and the Ninth Circuit held that PG&E decisions on whether to grant extensions to the five-year construction deadline in Standard Offer No. 4 contracts was regulated by the California Public Utilities Commission ("CPUC") and protected from antitrust challenge by the *Parker*

The Nugget projects were uneconomic, incapable of survival in a competitive market. The contract price set by regulation "more than five years ago . . . substantially exceeds PG&E's current 'avoided cost,' which would otherwise determine the energy price." Complaint at ¶ 11. As the California Public Utilities Commission ("CPUC") observed with respect to delayed projects like Nugget's:

> from a resource planning perspective, the ratepayer would prefer terminating the failed project. The utility would then pursue negotiations with another resource (including QFs) at prices and terms that reflect the current resource planning realities.

Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities, 29 C.P.U.C. 2d at 426.

B. Proceedings below.

With the following additions and clarifications, Nugget's statement regarding the proceedings below is adequate:

The district court dismissed Nugget's Section 1962(a) RICO claim for failure to plead facts showing 1) the requisite "pattern of racketeering," 2) that defendant derived income from the predicate acts or 3) that Nugget had been injured by the predicate RICO acts. Petitioner's Appendix ("Pet. App.") at A-30. In its opinion affirming

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v. Brown doctrine. *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429, 434-35 (9th Cir. 1992). Pertinent CPUC Guidelines are set forth in *Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities*, Decision 88-10-032, 29 C.P.U.C. 2d 415, 440-41 (1988).

the dismissal of Nugget's Section 1962(a) claim, the Ninth Circuit considered only the narrower question of whether Nugget was required to and did in fact plead that it had been injured by the use of racketeering income. It apparently did not find it necessary to address the other 1962(a) pleading defects ruled on by the district court.

With respect to the magistrate's order imposing sanctions on Nugget's counsel, Nugget never filed a request for review or reconsideration by the district judge of the magistrate's order denying its first motion to compel. Under Local Rule 410-2 of the United States District Court for the Northern District of California, such a motion must be filed within ten days of a magistrate's ruling.

In denying Nugget's second motion to compel production of essentially the same massive group of documents and imposing sanctions, the magistrate concluded that Nugget's claim of recent discovery of new evidence was pretextual:

> The factual evidence presented by NUGGET does not offer evidence of any unlawful conduct by PG&E related to private power companies, much less evidence of any fraud similar to that alleged by NUGGET. Nor is the evidence offered new. Much of it comes from magazine articles published in 1986 and 1987.

Pet. App. at A-36. Under the circumstances, "[t]he only possible purpose which the court can discern for such an action [Nugget's second motion to compel] is harassment, delay and increasing the cost of litigation." Pet. App. at A-37.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. The antitrust claim presents neither an issue on which the circuit courts are split nor an important federal question. The Ninth Circuit's ruling on this issue turned on allegations of the complaint specific to Nugget. Moreover, the ruling was correct and needs no further review.

2. Nugget's RICO claim was riddled with flaws. Resolution of the issue decided by the Ninth Circuit would not be determinative of the district court's dismissal. Therefore, this case does not present the issue framed in a "meaningful litigation" context and review would be inappropriate for that reason. Any conflict in the circuit courts is being resolved by the emergence of a clear majority rule. Moreover, the ruling was correct and needs no further review.

3. The discovery magistrate's order imposing sanctions for discovery abuse was purely factual, involved no conflict among the circuits or important federal question and hence is not appropriate for review. Moreover, the ruling was correct and needs no further review.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ANTITRUST ISSUE ON WHICH THE CIRCUITS ARE SPLIT, NO IMPORTANT QUESTION OF LAW, AND IS CONSISTENT WITH ESTABLISHED ANTITRUST DOCTRINE.

A. The Antitrust Ruling Presents No Important Question.

Nugget has not supplied convincing reasons why this Court should review the antitrust issue it seeks to

present. The circuit courts are not split on it and the issue is neither important nor as broad as petitioner would make it.

Nugget's formulation of the antitrust issue implies that the Ninth Circuit has ruled that no public utility can be liable under Section 2 of the Sherman Antitrust Act, 15 U.S.C. Section 2, to private power producers because "they are not competitors." Pet. at 10. The Ninth Circuit made no such pronouncement. Rather, it ruled, based on the specific factual allegations of Nugget's complaint, that *Nugget* was not a competitor of *PG&E*. The Ninth Circuit explained that, although Nugget argued that "it could have generated and sold power in interstate commerce in competition with PG&E," its "complaint alleges instead that Nugget planned to be a supplier to PG&E." *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429, 436 (9th Cir. 1992). Indeed, in both the complaint and in argument below, Nugget asserted that the sale of all project output to PG&E was the only economically viable alternative. Complaint at ¶ 13; Ninth Circuit Brief For Appellant at 23. Even its formulation of the question for review characterizes the wrongful act as "predatory conduct to prevent the developer from *complying with a power purchase agreement* . . . . " Pet. at i (emphasis added).

This ruling by the Ninth Circuit presents no "important" question of broad application. It affects and is of interest only to the parties. *See* Sup. Ct. R. 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari dismissed as improvidently granted because Court does not sit for the benefit of particular litigants) (Frankfurter, J.); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be

consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties . . . "). Since the Ninth Circuit's ruling on Nugget's antitrust claims turned solely on allegations in Nugget's complaint specific to it, the Ninth Circuit's ruling is of limited importance. It should not be reviewed by this Court.

B. The Antitrust Ruling Was Correct and Presents No Unsettled Issue.

Under this Court's decisions, it is well established that "willful acquisition or maintenance" of a monopoly is an essential element of monopolization in violation of Sherman Act § 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Ninth Circuit found that Nugget failed to plead this key element and thus affirmed the district court's dismissal of the antitrust claims. Specifically, the appellate court ruled that, because Nugget alleged in its complaint that it was committed to be a long term (30 year) supplier to PG&E, no monopolization claim was stated. The demise of a contractually committed supplier of electric power, as opposed to a competitor, would not enhance PG&E's monopoly power over the sale and distribution of electric power. 981 F.2d at 436.

There is nothing remarkable about such a ruling. Every regulated utility makes frequent decisions as to whether it will purchase energy from various suppliers. A decision not to do so may have the effect of excluding that supplier from the regulated company's "market." Such decisions, however, do not affect the "monopoly

power" of the utility, which still "controls" the distribution and resale of the power, subject of course to rate regulation. And, as here, even the purchasing decisions are frequently subject to review by a regulatory agency. *Id.* at 435. As one court put it, a private power project like Nugget's may "produce a component which is used by public utilities and consume utility service; but they are *not competitors* of public utilities." *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1373 (N.D. Ga. 1986) (emphasis added), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

Moreover, this Court has ruled in recent years that exclusionary conduct by a monopolist cannot be evaluated solely on the basis of its impact on the excluded business, even where, unlike here, that business is a rival. As stated in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985):

> [I]t is relevant to consider [the exclusion's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[32] If a firm has been "attempting to exclude rivals on some basis other than efficiency,"[33] it is fair to characterize its behavior as predatory.

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[32] "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

[33] Bork 138.

The Court reiterated that the focus of Section 2 is competition and not individual businesses in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993):

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. . . . The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics.

113 S. Ct. at 891-2.

Nugget's complaint about PG&E's interconnection cost estimates is merely an element of its fundamental argument that PG&E managed to avoid buying power from Nugget's projects. Whether that alleged objective was achieved by a refusal to extend the contract's construction deadline or by artificially inflating the interconnection costs or both, the result is the same. Since Nugget alieged that it was contractually committed to sell the power to PG&E for 30 years, Complaint at ¶ 10, and had no alternative market, Complaint at ¶ 13, there was no adverse impact on competition resulting from Nugget's demise.

PG&E's actions were also "efficient" and served consumer interests. Nugget's projects would never have been built in an unregulated, competitive market. Their cost

was too high. Nugget specifically alleged that their energy cost was substantially above PG&E's avoided cost. Complaint at ¶ 11. Had they been competitively priced, PG&E would have been willing to purchase the power. As Nugget acknowledges, "PG&E offered a deferral of the power delivery deadline if Nugget would agree to certain price concessions . . . which would have rendered the projects economically unviable. . . . " Pet. at 5. Raising the possibility of price concessions was called for by the CPUC Guidelines. *Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities*, 29 C.P.U.C. 2d at 440 ¶ I.1.[4]

Nugget argues that the Ninth Circuit erroneously rejected Nugget's "allegation" that it was a competitor of PG&E because it could have sold electricity in competition with PG&E by having power "wheeled" to others. Pet. at 10-11. However, *nowhere in its complaint* did Nugget allege this. To the contrary, the complaint made clear that if the power purchase agreements had been fulfilled by Nugget and the projects completed, their full output would have been committed to PG&E for 30 years. Complaint at ¶ 10.

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[4] For the same reason its monopolization claim fails, so too does Nugget's attempted monopolization claim. This Court's recent *Spectrum Sports* decision held that an attempted monopolization claim is stated only if there is proof of a "dangerous probability of success" of monopolization. *Spectrum Sports*, 113 S. Ct. at 892. The Ninth Circuit properly concluded that, since Nugget pled no facts showing that the elimination of its projects had an effect on competition in the relevant market, it had not pled an attempt to monopolize.

Nugget's "wheeling" theory ignores both its contract and the fact that no one else would have purchased power from its uneconomic projects. The argument is based solely on Nugget's theoretical rights under PURPA to seek transmission from PG&E to another buyer. The complaint alleges neither that Nugget had other buyers nor that Nugget could economically do anything other than sell power to PG&E at the contract price. Complaint at ¶¶ 10, 13.[5]

II. PETITIONER'S RICO ISSUE IS ENTIRELY THEORETICAL; THIS CASE DOES NOT CLEARLY PRESENT IT.

Nugget has not set forth convincing reasons for review of its 18 U.S.C. § 1962(a) claim. This claim involves yet another question arising under the Racketeering Influenced and Corrupt Organizations Act ("RICO") in the context of civil business litigation. Review of the RICO issue Nugget has framed would be a

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[5] Nugget's argument that the Ninth Circuit improperly refused to consider an "alternative basis for Petitioner's status as a competitor of PG&E" not included in Nugget's opening brief presents no significant issue for review. Pet. at 11. The cases that Nugget cites reflect no dispute in the Circuits on the scope of their discretion not to consider new arguments first raised in a reply brief. *See In re Riverside-Linden Investment Co.*, 945 F.2d 320 (9th Cir. 1991) (cited in Pet. at 11, n. 6) (court refused to hear argument not raised in opening brief); *Picker International, Inc. v. Parten*, 935 F.2d 257 (11th Cir. 1991) (*id.*) (issue was substantially raised in opening brief); *Jackson v. University of Pittsburg*, 826 F.2d 230 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (*id.*) (court refused to hear argument not raised in opening brief).

theoretical exercise having no effect on the ultimate disposition of the litigation.

A. Because There Exist Other Grounds For Affirmance Not Addressed In The Petition, The RICO Issue Nugget Presents Is Entirely Theoretical.

This Court has not hesitated to deny review, even in cases of conflict among the circuits, where review of an issue would not necessarily affect the ultimate outcome of a case:

> [w]hile this Court decides questions of public importance, it decides them in the context of *meaningful litigation*. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the . . . [issue in conflict] can await a day when the issue is posed less abstractly.

Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184 (1959) (emphasis added) (Court could decide case on other grounds). Nugget has framed an abstract, theoretical RICO issue whose resolution would not affect the ultimate outcome of the case.

The appeals court below ruled that Nugget failed to state a RICO claim pursuant to 18 U.S.C. Section 1962(a) because it did not allege injury from the use or investment of income derived from racketeering activity. 981 F.2d at 437-38. Nugget claims error by contending that it need only show injury from *racketeering acts* which subsequently generated income used in an enterprise, even if Nugget suffered no harm by the use of that income. Pet.

at 13. Even were the Court to decide this issue in Nugget's favor, the result of the lawsuit would be the same for at least two reasons.

First, the district court found that Nugget had also failed to plead a "pattern of racketeering." Pet. App. at 29-30. This is an essential element of any claim for relief under RICO. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989). Thus, should the Court grant the petition and find in Nugget's favor on the "use or investment" issue, Nugget would still be barred from relief.

This case does not clearly present the issue which Nugget has attempted to frame for a second reason. Nugget concedes that to state a Section 1962(a) claim, it must at least allege that PG&E *derived income* from the alleged racketeering acts, even though Nugget did not suffer injury from the use or investment of that income: "[t]he plain language of § 1962(a) provides only that the income derived from the racketeering activity be used subsequently in the operation of the enterprise." Pet. at 13. The district court reviewed Nugget's pleadings and concluded that Nugget had failed to allege this requisite element of Section 1962(a): "[t]here is no showing whatsoever that defendant derived income from any alleged actions against plaintiff." Pet. App. at A-30.

Nugget would have this Court decide a narrow RICO issue not likely to affect the outcome of this litigation. The issue is thus not presented in a "meaningful litigation" context which justifies certiorari review.

B. The "Conflict" Among The Circuits Is Being Resolved By The Emergence Of A Clear Majority Rule And Does Not Merit Review.

While the Ninth Circuit is in apparent disagreement with the Fourth, recent decisions indicate that the "split" in the circuits is being resolved by the emergence of a clear majority view. The "conflict" is nothing more than an aberrational rule in one circuit, the Fourth.

Nugget itself points out that of the five circuits that initially considered this issue, four – the Second, Third, Ninth and Tenth – disagreed with the Fourth Circuit's interpretation. *Compare Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), *with Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989); *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429 (9th Cir. 1992); *and Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). Considering all recent rulings, a total of eight circuits have now considered this question. *Seven* have squarely rejected the position taken by the Fourth Circuit and by Nugget. *See also Parke & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580 (5th Cir. 1992); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1992); *Danielson v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991).

Generally, review is provident where there exists a sufficiently sharp conflict among the circuits or a diversity of approaches in the lower courts. *H.J., Inc.*, 492 U.S. at 251 ("widest and most persistent circuit split on an issue of federal law in recent memory"); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 and nn. 5-6 (1985)

("variety of approaches taken by the lower courts"). Here, by contrast, the split is being resolved without this Court's intervention by the emergence of a clear (7-1) majority rule. Should the Fourth Circuit subsequently reaffirm its position in light of these other circuit decisions, perhaps such a case would warrant review by this Court. This Court has previously denied review of the issue posited by Nugget and should do so again. *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.) *cert. denied*, 493 U.S. 820 (1989).

C. The Ninth Circuit's Ruling Was Correct And Consistent With The Decisions Of This Court.

In any event, the position adopted by the Ninth and six other circuits regarding Nugget's Section 1962(a) claim is correct. Section 1964(c) provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation of § 1962." To seek redress under Section 1964(c), a plaintiff must therefore allege that a violation of 1962(a) is the cause of the injury. In *Sedima*, this Court recognized that a RICO plaintiff has standing only if he has been injured in his business or property "by the conduct constituting the violation." *Id.* at 496. The rule adopted by the Ninth and six other circuits follows the logic of the language of section 1964(c) and the Court's language in *Sedima*.

The Ninth Circuit ruling is also consistent with the approach to interpreting RICO taken by this Court in *Reves v. Ernst & Young*, 61 U.S.L.W. 4207, 4209-11 (March 3, 1993). Interpretation begins with an examination of the statutory language. *Id.* at 4209; *see also Russello v. United*

States, 464 U.S. 16, 20 (1983). Section 1962(a) provides in pertinent part that:

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise . . . .

Thus, one runs afoul of Section 1962(a) not by engaging in racketeering activity, but by using or investing income derived from such racketeering acts. To permit recovery under Section 1962(a) for injuries caused by acts of racketeering, as opposed to the use or investment of racketeering income, as Nugget contends, would permit recovery even though plaintiff was not injured "by reason of" a violation of Section 1962(a). Such a reading is not compatible with the plain language of the statute.[6]

In contrast, the Fourth Circuit has ruled that all a plaintiff need show was injury "by reason of" racketeering activity, "despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury." *Busby*, 896 F.2d at 837-38.

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[6] This reading of the language is consistent with this Court's reading of the legislative history of RICO. The Court noted in *Reves* that the consistently recognized purpose of 1962(a) was to prevent the *acquisition of an enterprise* through the use of funds derived from racketeering. 61 U.S.L.W. at 4210. Here there is no suggestion that income derived by PG&E was used in the acquisition of an enterprise.

The *Busby* decision thus contradicts the plain and unambiguous language of Section 1964(c). As the court below explained, the *Busby* decision:

> would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an "element of a violation" but rather only of a "violation."

Nugget Hydroelectric, 981 F.2d at 437.

RICO's "liberal construction" clause, which explicitly lay behind the novel *Busby* rule, 896 F.2d at 838, is not a valid basis for that rule. In *Reves*, the Court rejected a similar argument that the liberal construction clause could be used to expand the scope of RICO beyond the statutory language. As the Court observed, the liberal construction clause:

> seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."

61 U.S.L.W. at 4211, *citing Sedima*, 473 U.S. at 492 n.10.

III. A MAGISTRATE'S FACTUAL DETERMINATIONS REGARDING DISCOVERY DO NOT WARRANT REVIEW.

Nugget also seeks review of sanctions which the discovery Magistrate imposed on Nugget for abusive and

duplicative discovery motions. Nugget would have the Court engage in an extensive fact-bound inquiry regarding Nugget's discovery abuses. The Court ordinarily denies review of decisions which turn solely on the particular facts involved. *Texas v. Mead*, 465 U.S. 1041 (1984).

The Magistrate denied Nugget's first motion to compel the production of literally millions of documents based on factual considerations. He found Nugget had failed to make "a *factual* showing that discovery into transactions unrelated to the RICO allegations contained in the complaint are reasonably calculated to lead to admissible evidence of *similar fraud*." *See* Order Re Discovery, filed January 10, 1991 at 6 (emphasis in original), *citing PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990).

Instead of seeking "reconsideration" of the Magistrate's order by the district judge, as prescribed by local rule 410-2, Nugget later filed a second motion – to compel production in response to a second set of document requests asking for virtually the same documents sought in the request just denied. *Id.*

The Magistrate denied discovery on these requests for several reasons, all of which involved factual determinations:

> [i]n effect it [Nugget] has attempted to re-litigate a previous motion, which it lost . . . the only possible purpose which the court can discern for such an action is harassment, delay and increasing the cost of litigation.

Pet. App. at A-37. Thus, the Magistrate sanctioned Nugget for filing a frivolous, duplicative motion to compel, virtually identical to one he previously denied. *Id.*

Because the two requests were substantially similar, the Magistrate also denied the second motion to compel for failure to comply with the reconsideration procedures of local rule 410-2. *Id.* Finally, the Magistrate mentioned that Nugget's failure to certify that it initiated a good-faith meet and confer conference to resolve the discovery dispute informally with opposing counsel pursuant to local rule 230-4 in both the first and second motions to compel constituted independent grounds to deny either motion. *Id.* The district court affirmed the Magistrate's findings. Pet. App. at A-38.

Nugget would draw this Court into deciding the foregoing factual issues, such as whether the second request for production was substantially similar to the first request and whether Nugget in fact complied with various local rules. Perhaps sensing this obstacle to review, Nugget also alleges that the Magistrate, as affirmed by the district court, improperly imposed sanctions where Nugget had found "new evidence" to justify the second request for production and second motion to compel. Pet. at 14. The Magistrate disagreed with Nugget's characterization of the facts: "the evidence offered is not new. Much of it comes from magazine articles published in 1986 and 1987." Pet. App. at A-36.

Moreover, Nugget misses the point. If this new evidence were indeed new, it was not necessary to seek "reconsideration" of the Magistrate's order in the district

court at all. Although Nugget was entitled to seek production of documents based on any new information, it was a factual determination for the Magistrate as to whether this evidence was indeed "new" or not.

This issue is manifestly not suitable for review. Nugget has unsuccessfully sought to dress up a factual dispute regarding discovery into a major federal question. PG&E submits that the foregoing discovery dispute between two private parties is of no importance to anyone other than the litigants.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit was consistent with the opinions of this Court, involves no important federal questions and is correct. To the extent the petition implicates an issue on which the circuits conflict, the petition does not so clearly present the issue as to warrant review. For these reasons the petition for a writ of certiorari should be denied.

Dated: April 9, 1993.

Respectfully submitted,

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